STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CLIFTON JOHNSON, Charging Party, v. CITY & COUNTY OF SAN FRANCISCO, Respondent.	Case No. SF-CE-1006-M PERB Decision No. 2375-M June 3, 2014

Appearance: Clifton Johnson, on his own behalf.

Before Martinez, Chair; Winslow and Banks, Members.

DECISION[1]

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Clifton Johnson (Johnson) of the dismissal (attached) by the Office of the General Counsel of Johnson's unfair practice charge. The charge, as amended, alleges that the City & County of San Francisco (CCSF) violated the Meyers-Milias-Brown Act (MMBA)[2] with respect to his dismissal from employment. The Office of the General Counsel dismissed the charge on timeliness grounds and for failure to state a prima facie case.

The Board has reviewed the case file in its entirety. Based on this review, we find the warning and dismissal letters to be based on a complete and accurate understanding of the factual allegations of the charge. We find the legal analysis and conclusions in the warning

[1] PERB Regulation 32320, subdivision (d), provides in pertinent part: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under Section 32635 [Board Review of Dismissals] shall determine whether the decision or order, or any part thereof, shall be designated as precedential." Having met none of the criteria enumerated in the regulation, the decision herein has not been designated as precedential. (PERB Regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

[2] The MMBA is codified at Government Code section 3500 et seq.

and dismissal letters to be well-reasoned and in accordance with applicable law. The appeal raises no issues that were not already adequately addressed below.[3] Therefore the Board's further review of this case is unwarranted. The Board hereby affirms the dismissal of the charge and adopts the warning and dismissal letters as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CE-1006-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Winslow and Banks joined in this Decision.

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[3] Attached to the appeal is a copy of a California Unemployment Insurance Appeals Board administrative law judge decision arising out of Johnson's appeal from an Employment Development Department determination disqualifying him for unemployment insurance benefits on the grounds of misconduct. The decision was mailed to Johnson on May 1, 2013, predating the dismissal of his unfair practice charge on July 8, 2013.

On appeal, a charging party may not present new charge allegations or new supporting evidence unless good cause is shown. (PERB Reg. 32635, subd. (b).) The purpose of this regulation "is to require the charging party to present its allegations and supporting evidence to the Board agent in the first instance, so that the Board agent can fully investigate the charge prior to deciding whether to issue a complaint or dismiss the case." (*South San Francisco Unified School District* (1990) PERB Decision No. 830.) The Board has found good cause when "the information provided could not have been obtained through reasonable diligence prior to the Board agent's dismissal of the charge." (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.) Johnson's unemployment decision was mailed out approximately two months prior to the dismissal of Johnson's unfair practice charge and the appeal provides no reason why the decision could not have been provided to the Office of the General Counsel prior to dismissal. As important, a favorable unemployment benefits decision is not determinative on the issue of whether a charging party has stated a prima facie unfair practice case. Johnson proffers the unemployment decision to support his position that the CCSF did not have a written absentee policy made pursuant to a meet and confer process between CCSF and his exclusive representative. As the Office of the General Counsel stated, however, individual employees do not have legal standing to allege violations of the MMBA under sections that protect the collective bargaining rights of employee organizations. (Warning letter, p. 2.) Therefore, even were we to find good cause to consider the unemployment decision, it would not compel a conclusion different than the one reached by the Office of the General Counsel.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027

July 8, 2013

Clifton Johnson

Re: *Clifton Johnson v. City & County of San Francisco*
Unfair Practice Charge No. SF-CE-1006-M
DISMISSAL LETTER

Dear Mr. Johnson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 6, 2012. Mr. Clifton Johnson (Charging Party) alleges that the City & County of San Francisco (CCSF or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] with respect to his dismissal from employment.

On December 21, 2012, CCSF filed a position statement.

Charging Party was informed in the attached Warning Letter dated March 25, 2013, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. Charging Party was further advised that, unless the charge was amended to state a prima facie case or withdrawn prior to April 8, 2013, the charge would be dismissed. Subsequently, an extension of time was granted.

On April 17, 2013, Charging Party timely filed a First Amended Charge. On May 13, 2013, CCSF filed a further Position Statement. The First Amended Charge does not cure the deficiencies discussed in the Warning Letter, and does not state a prima facie case. Therefore, the charge is hereby dismissed based on the facts and reasons set forth herein and in the March 25, 2013, Warning Letter.

Allegations of the First Amended Charge

As stated in the Warning Letter, Charging Party was employed as a Transit Fare Inspector by the CCSF Municipal Transportation Agency (MTA). In this position, he was exclusively represented by the Transit Workers Union, Local 250-A (TWU). On May 11, 2012, Charging Party was terminated from this position for excessive absenteeism. However, the CCSF and

[1] The MMBA is codified at Government Code section 3500 et seq. PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

TWU had "no meet and confer process on the issue therefore the [CCSF] has no policy regarding absenteeism."

As stated in the Warning Letter, Charging Party was initially terminated on approximately April 3, 2010, pursuant to an arbitration award finding just cause for his termination. Subsequently, however, Charging Party was reinstated to his employment, subject to certain contingencies set forth in a "Last Chance Agreement," dated October 13, 2011. The Last Chance Agreement includes the following relevant language.

> 2. In the event that JOHNSON violates any City or Departmental Rule regarding absenteeism during the twelve (12) months following the date he signs this agreement, SFMTA shall cease to hold the termination in abeyance and shall dismiss JOHNSON from employment as a 9132 Transit Fare Inspector. JOHNSON and the UNION waive all rights to any administrative proceeding, including the grievance process, in the event SFMTA decides to implement the termination during that twelve (12) month period. The termination decision will be subject only to a review by the Director of Transportation.
>
> 3. JOHNSON acknowledges that he freely and voluntarily entered into this AGREEMENT and that he understands each and every provision set forth herein. JOHNSON further certifies that he understands the waiver set forth in paragraph 2 above and recognizes it is a total waiver of all rights to challenge through the grievance process, any decision by SFMTA to implement the termination during the twelve (12) months following his signature on this AGREEMENT. JOHNSON further acknowledges that he has had an opportunity to consult with a UNION representative prior to the execution of this AGREEMENT and that he has done so.
>
> 4. JOHNSON agrees to waive any litigation or administrative rights against the SFMTA, the CITY and any employees of the CITY regarding this AGREEMENT, any consequences of or action that results from the AGREEMENT, his employment or dismissal therefrom. ...

The parties and signatories to the Last Chance Agreement are Charging Party, TWU President Rafael Cabrera, and MTA Deputy Director of Human Resources Donald Ellison.

Charging Party contends that CCSF denied him "the right to have full and fair representation because of the agreement that was entered in[to] and to be able to challenge the [CCSF's] termination decision through the TWU Local 250-A."

Statute of Limitations

PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)[2] A charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.)

Charging Party signed the Last Chance Agreement on October 13, 2011. The instant charge was filed more than six months later, on November 6, 2012. Charging Party alleges that he was denied the right to representation "because of the agreement that was entered in[to] ..." To the extent that Charging Party alleges that the Last Chance Agreement violated the MMBA, such a violation would be untimely filed as more than six months beyond the date of the agreement.

Discussion

Charging Party alleges that, because of the Last Chance Agreement, he was deprived of his right to have union representation to challenge his termination, which took effect on May 11, 2012. Even assuming these allegations were timely filed, they do not state a prima facie case of a violation of the MMBA.

Employees covered by the MMBA generally have a protected right to representation by their exclusive representative for work-related issues. (Gov. Code, § 3502; *City of Monterey* (2005) PERB Decision No. 1766-M.) For example, an employee required to attend an investigatory interview with the employer is entitled to union representation where the employee has a reasonable basis to believe discipline may result from the meeting.[3] In order to establish a violation of this right, the charging party must demonstrate: (a) the employee requested representation; (b) for an investigatory meeting; (c) which the employee reasonably believed might result in disciplinary action; and (d) the employer denied the request. (See *Redwoods Community College District v. Public Employment Relations Board* (1984) 159 Cal.App.3d 617 (*Redwoods*); *Fremont Union High School District* (1983) PERB Decision No. 301; see

[2] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

[3] In *National Labor Relations Board v. Weingarten* (1975) 420 U.S. 251 (*Weingarten*), the U.S. Supreme Court granted employees the right to representation during disciplinary interviews. PERB adopted the *Weingarten* rule in *Rio Hondo Community College District* (1982) PERB Decision No. 260

also, *Social Workers' Union, Local 535 v. Alameda County Welfare Department* (1974) 11 Cal.3d 382.)

Here, there is no allegation that Charging Party specifically sought union representation at any time or that he advised the employer that he wanted such representation. (*Bay Area Air Quality Management District* (2006) PERB Decision No. 1807-M [no denial of representation when none requested].) While it appears that Charging Party may have generally desired representation in connection with his termination, Charging Party does not allege that he engaged in any specific protected act of requesting union representation.[4] (*Trustees of the California State University* (2009) PERB Decision No. 2038-H.) Accordingly, Charging Party's allegation that he was denied "full and fair representation" and a right to challenge his termination because of the Last Chance Agreement does not state a prima facie violation of the MMBA.[5]

Right to Appeal

Pursuant to PERB Regulations, Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

[4] It is noted that the Last Chance Agreement includes an express waiver of Charging Party's rights to challenge any termination decision through an administrative proceeding or grievance, however, the document does not expressly state that Charging Party waives any rights to seek the advice or assistance of his union.

[5] Charging Party's allegations concerning the lack of a negotiated absenteeism policy are addressed in the Warning Letter. As stated in the Warning Letter, Charging Party lacks standing with respect to this claim.

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

M. SUZANNE MURPHY
General Counsel

By _____
Laura Z. Davis
Senior Regional Attorney

Attachment

cc: Na'il Benjamin, Deputy City Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027

March 25, 2013

Clifton Johnson

Re: *Clifton Johnson v. City & County of San Francisco*
Unfair Practice Charge No. SF-CE-1006-M
WARNING LETTER

Dear Mr. Johnson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 6, 2012. Mr. Clifton Johnson (Mr. Johnson or Charging Party) alleges that the City & County of San Francisco (CCSF or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by dismissing him from his employment.

Summary of Facts

Mr. Johnson was employed as a Transit Fare Inspector by the CCSF Municipal Transportation Agency (MTA). In this position, he was exclusively represented by the Transit Workers Union, Local 250-A (TWU). On approximately February 12, 2010, MTA terminated Mr. Johnson from his employment while Mr. Johnson was on an approved leave of absence. On April 3, 2010, Arbitrator Alexander Cohn issued an opinion and award finding that MTA had just cause for dismissing Mr. Johnson, due to his excessive absenteeism, related to substance abuse treatment.

Mr. Johnson filed a complaint with the Department of Fair Employment and Housing. On October 13, 2011, MTA, Mr. Johnson, and TWU entered into a "Last Chance Agreement." The Last Chance Agreement provides that Mr. Johnson will be terminated from employment if he "violates any City or Departmental Rule regarding absenteeism" in the subsequent twelve months. The Last Chance Agreement also provides that TWU and Mr. Johnson "waive all rights to any administrative proceeding, including the grievance process, in the event [MTA] decides to implement the termination during that twelve month period. The termination decision will be subject only to a review by the Director of Transportation." The Last Chance Agreement further provides that this is recognized as a "total waiver of all rights" to challenge any termination decision, and that Mr. Johnson waives any litigation or administrative rights

[1] The MMBA is codified at Government Code section 3500 et seq. PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

regarding the Last Chance Agreeement, any consequences of the Last Chance Agreement, his employment, and any dismissal from his employment.

Mr. Johnson returned to work on November 1, 2011. On January 6, 2012, he received a verbal warning from manager Robert Wolfgang (Mr. Wolfgang) regarding taking time off work. Mr. Johnson asked to see the policy on absenteeism; Mr. Wolfgang said he had nothing in writing but that MTA employees are allowed to have three absences within three months "as part of smart goals to follow." Mr. Johnson reported to work all of January and February 2012, and took off work again in the months of March, April and May 2012.

On April 20, 2012, Mr. Johnson received a letter for a Proposed Dismissal for Excessive absenteeism. A *Skelly* hearing[2] was held on May 1, 2012, with Operations Manager Shalonda Baldwin (Ms. Baldwin) and Labor Manager Mike Helms (Mr. Helms). TWU representative Ron Austin (Mr. Austin) also attended. Mr. Austin stated that current MTA policy allows three absences in three months, on a rolling basis. However, Mr. Austin stated, MTA and TWU have not had a meet and confer process on the issue, therefore there is no policy in place.

On May 11, 2012, Commander of Enforcement Lea Militello (Ms. Militello) gave Mr. Johnson the *Skelly* hearing decision and told him he was terminated by the MTA because of excessive absenteeism. TWU could not be further involved because of the Last Chance Agreement.

PERB's Jurisdiction

The MMBA does not extend a remedy against all acts of perceived unfairness or discrimination against public employees. PERB's jurisdiction is limited to resolving claims of unfair practices, as defined, which violate the Acts enforced by PERB. (See, e.g., *Los Angeles Unified School District* (1984) PERB Decision No. 448.) PERB does not have jurisidiction to address alleged violations of other laws, such as the Education Code or Labor Code. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2018-S.)

It appears that Charging Party alleges that his dismissal for absenteeism was improper because it was based upon an absenteeism policy which was not in writing, and which was not made pursuant to a meet-and-confer process between MTA and TWU. These allegations, however, do not necessarily establish any violation of the MMBA.

To the extent that Charging Party alleges that the employer improperly adopted, or failed to adopt, an absenteeism policy which was not properly negotiated with his union, Charging Party lacks standing to advance such a claim. Individual employees do not have legal standing to allege violations of MMBA sections which protect the collective bargaining rights of employee organizations. (*Oxnard School District (Gorcey/Tripp)* (1988) PERB Decision No. 667; *State*

[2] In *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, the Supreme Court held that due process mandates that a public employee be accorded certain procedural rights before proposed discipline becomes effective.

of California (Department of Corrections) (1993) PERB Decision No. 972-S.) These claims may only be brought by the employee organization.

To the extent that Charging Party alleges that the Last Chance Agreement was violated, PERB does not have jurisdiction to enforce contracts, unless the violation would independently be a violation of the MMBA. (*County of Riverside* (2003) PERB Decision No. 1577-M; *City of San Juan Capistrano* (2012) PERB Decision No. 2238-M.)[3] In addition, the Last Chance Agreement includes an express waiver of Charging Party's litigation and administrative rights to challenge his termination.

Retaliation Standard

The charge does not allege any basis for a violation of the MMBA. The following information is provided to assist Charging Party.[4]

To demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

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[3] Certain labor relations statutes specifically exclude the authority to enforce agreements between the parties from PERB's jurisdiction unless the violation would independently be an unfair practice charge. (See Gov. Code, §§ 3541.5(c), 3563.2(b), 3514.5(b).) While this specific provision is not included in the MMBA, PERB has consistently held that a party alleging a breach of a negotiated agreement must show that the breach has "a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment." (*East Side Union High School District* (1997) PERB Decision No. 1236.)

[4] PERB Regulation 32620 provides that Board agents are to assist the Charging Party to state in proper form the information required by PERB Regulation 32615.

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210).

Charging Party does not, however, allege that he exercised rights under the MMBA[5] or that he was terminated for exercising his rights under the MMBA, rather, he alleges he was terminated because of an unclear policy regarding absenteeism.

For these reasons the charge, as presently written, does not state a prima facie case.[6] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case

[5] To the extent TWU represented Charging Party with respect to the Last Chance Agreement, this may be considered protected activity. Howe ver, this information is not provided in the charge.

[6] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before **April 8, 2013**,[7] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Laura Z. Davis
Senior Regional Attorney

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[7] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)